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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CRESPO, Defendant and Appellant.	C036620 (Super. Ct. No. 00F03409)

A jury convicted defendant Anthony Crespo of possession of methamphetamine for sale (Health & Saf. Code, § 11378; count one) and transportation of methamphetamine (Health & Saf. Code, § 11379; count two). In bifurcated proceedings, defendant admitted a previous conviction (Health & Saf. Code, § 11378) within the meaning of Penal Code section 1203.07, subdivision (a)(11) as to count one and within the meaning of Health and Safety Code section 11370.2, subdivision (c) as to count two.

Defendant also admitted a strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and four prior prison terms (Pen. Code, § 667.5, subd. (b)).

Sentenced to state prison for an aggregate term of 13 years, defendant appeals, contending (1) the trial court erroneously refused defendant's request to include the bracketed language in CALJIC No. 2.02 as to the "mental state" as to both counts one and two and (2) a mistrial based on prosecutorial misconduct should have been granted. We will affirm the judgment.

FACTS

About 11:35 p.m. on April 20, 2000, Sacramento Police Officer John Banks stopped a car with expired registration tags. Defendant was driving and no one else was in the car. The officer confirmed with the Department of Motor Vehicles that the registration was expired and that defendant's driver's license was suspended. The car was impounded. An inventory search revealed thirteen $20 bills rolled up and in the driver's door handgrip used to close the door. On the floor between the driver's seat and console, an officer found a brown paper bag containing two baggies with a total of 6.44 grams of methamphetamine and a digital gram scale in a pouch. A buck knife was found under the bag. Defendant was arrested and booked. A search of defendant's person revealed a pager and an address book.

Prints lifted from the brown paper bag, baggies and scale did not match the fingerprints of either defendant or Douglas Hernandez, the owner of the car.

At trial, an expert witness opined that the methamphetamine was possessed for sale based on the number of $20 bills, the weight of the methamphetamine possessed (two “eight balls”), the pager which provided a means for users to contact the dealer, the scale to measure the methamphetamine sold and the lack of paraphernalia. The expert believed that less than five percent of users possess two “eight balls” for personal use. The lack of a cellular phone did not change the expert’s opinion that the methamphetamine was possessed for sale.

Defendant did not testify.

Hernandez testified for the defense. He knows defendant through defendant’s sister. Hernandez considers defendant a friend but denied that he would lie for defendant. On April 20, 2000, Hernandez loaned his car to defendant. When he did so, he knowingly left inside seven grams of methamphetamine for his personal use, a buck knife, a scale, and $260 in the armrest of the driver’s door. Hernandez admitted having been arrested for a drug-related offense. Hernandez never got his car back because he did not have enough money to get it out of impound. He was aware he could be arrested for admitting the methamphetamine was his.

On cross-examination, Hernandez admitted having known defendant for seven years having dated and lived with defendant’s sister for about that period of time. Hernandez had

a child with defendant's sister. He had borrowed $260 from defendant's sister the day of defendant's arrest to pay for a smog inspection for the car in order to register it. He obtained neither the inspection nor registration that day. He drove the car two or three times a week but had not driven it for a week prior to putting the items in the car. Hernandez did not trust people and would never leave his jewelry in the car. On the day of defendant's arrest, Hernandez loaned his car to defendant who needed a ride. Hernandez had never before loaned his car to defendant. Hernandez claimed he forgot about the items in the car. He then stated that he knew the items were in the car but did not tell defendant because he left too fast.

Hernandez had spoken with defendant only a couple of times since defendant's arrest and had visited defendant at the jail once. After defendant told Hernandez what happened, Hernandez claimed he would tell the authorities that the methamphetamine was his. Hernandez never did. Defendant asked Hernandez one time if Hernandez was going to follow through. Hernandez told defendant that he had made an appointment but failed to show.

Hernandez initially refused to identify the supplier of the methamphetamine found in the car. When the prosecutor moved to strike Hernandez's testimony, Hernandez claimed his supplier was "George" but did not know his last name or phone number. Two days before defendant's arrest, Hernandez claimed he met George playing pool at a bar called Yolanda's. After playing for a couple of hours, George asked Hernandez if he knew whether "anybody [was] looking for anything." Hernandez bought seven

grams of methamphetamine, in one package, for $150. Hernandez used his scale to measure it and later divided it, not to sell, but to smoke. He last saw his purchase on the 18th when he bought it from George. Hernandez did not use any on the 18th, 19th or 20th. Although he usually kept methamphetamine in his pocket, he put it in his car. He usually kept his pipe in his pocket or hidden in the house. He could not explain why he did not keep the methamphetamine at the house.

Hernandez claimed he smoked about an eight ball every other day. He said that he smoked a $20 bag at a time. He initially refused to identify his previous supplier (before "George" from whom he purchased methamphetamine only once). The court ordered Hernandez to answer or his entire testimony would be stricken. Hernandez claimed, "I didn't say I used before that." He then admitted having used every other day and his supplier was "David Speed" but Hernandez did not have an address or phone number. At first he claimed he had other suppliers but then quickly retracted that statement and claimed only Speed had been his supplier.

Hernandez claimed he no longer used, the last time being in July when he bought about a quarter ounce. He used to buy on a weekly basis. He had to borrow money to smog and register his car because he spent all his money on methamphetamine.

Hernandez admitted an arrest for drug paraphernalia in July 2000. He knew he could be arrested for claiming the methamphetamine in the car was his. He claimed no one had threatened or asked him to testify. Hernandez admitted that the

consequences of admitting the offense were "much greater for the defendant" than for him but that did not influence his testimony. He admitted failing to meet with district attorney investigators despite having had two appointments. He finally met with an investigator the week before trial.

DISCUSSION

I

Defendant contends the trial court deleted bracketed language in the standard instruction on sufficiency of circumstantial evidence to prove specific intent and/or mental state (CALJIC No. 2.02) which would have instructed the jury about circumstantial evidence of the mental state of knowledge required as to both offenses charged. We conclude that the jury was properly instructed and that, in any event, any error was harmless.

Background

CALJIC No. 2.02 provides:

"The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] _____, _____, _____, and _____], [or] [the crime[s] of _____, _____, _____, which [is a] [are] lesser [crime[s],] [or] [find the allegation _____ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and]

[mental state] but (2) cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

The trial court deleted the bracketed language as to "mental state" over defense counsel's objection. Defense counsel argued that both offenses included the mental state of knowledge. The trial court limited CALJIC No. 2.02 to "specific intent" which related to count one (possession for sale) only.[1]

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[1] The trial court instructed the jury in the language of CALJIC No. 2.02, as modified, as follows:

"The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Count One, possession of methamphetamine for the purposes of sale, unless the proved circumstance are not only, one, consistent with the theory that the defendant had the required specific intent but, two, cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to the specific intent permits two reasonable interpretations, one of which points to the

[*Footnote continued*]

Standard of Review

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"The plain meaning of [CALJIC Nos. 2.01 and 2.02] merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt." (*People v. Jennings* (1991) 53 Cal.3d 334, 386; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 181.)

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) Another instruction or the instructions as a whole may cure any defect in one. (*Ibid.*)

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existence of the specific intent and the other to its absence, you must adopt that interpretation which points to its absence.

"If, on the other hand, one interpretation of evidence as to the specific intent appears to you to be reasonable and the other to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

Analysis

The trial court instructed the jury on the elements of the offenses, possession of methamphetamine for sale (CALJIC No. 12.01) and transportation of methamphetamine (CALJIC No. 12.02).[2]

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[2] The trial court instructed the jury in the language of CALJIC No. 12.01 as follows:

"Defendant is accused in Count One of having committed the crime of illegal possession for sale of a controlled substance, a violation of Section 11378 of the Health and Safety Code.

"Every person who possesses for sale methamphetamine, a controlled substance, is guilty of a violation of Health and Safety Code Section 11378, a crime.

"There are two kinds of possession: Actual possession and constructive possession[.]

"Actual possession requires that a person knowingly exercise direct physical control over a thing.

"Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.

"One person may have possession alone, or two or more persons together may share actual or constructive possession.

"In order to prove this crime, each of the following elements must be proved:

"One, a person exercised control over or the right to control an amount of methamphetamine, a controlled substance;

"Two, that person knew of its presence;

"Three, that person knew of its nature as a controlled substance;

[*Footnote continued*]

Elements of both offenses include that defendant knew of the presence of the methamphetamine and of the nature of the substance as a controlled substance. The trial court instructed the jury on direct and circumstantial evidence (CALJIC No. 2.00)[3]

"Four, the substance was in an amount sufficient to be used for sale or consumption as a controlled substance;

"And, five, that person possessed the controlled substance with the specific intent to sell the same."

The trial court instructed the jury in the language of CALJIC No. 12.02 as follows:

"Defendant is accused in Count Two of having violated Section 11379 of the Health and Safety Code, a crime. Every person who transports methamphetamine, a controlled substance, is guilty of a violation of Health and Safety Code Section 11379, a crime.

"In order to prove this crime, each of the following elements must be proved:

"One, a person transported methamphetamine, a controlled substance;

"And, two, that person knew of its presence and nature as a controlled substance."

[3] The trial court instructed the jury in the language of CALJIC No. 2.00 as follows:

"Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

"Evidence is either direct or circumstantial.

"Direct evidence is evidence that directly proves a fact. It is evidence which, by itself, if found to be true, establishes that fact.

[*Footnote continued*]

and that a crime may be proven by circumstantial evidence (CALJIC No. 2.01).[4]

"Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

"An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

"It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence.

"Both direct and circumstantial evidence are acceptable as a means of proof, and neither is entitled to any greater weight than the other."

[4] The trial court instructed the jury in the language of CALJIC No. 2.01 as follows:

"However, a finding of guilt as to any crime may not be based on circumstantial evidence, unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

"In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt.

[*Footnote continued*]

The jury was also instructed to consider the instructions as a whole (CALJIC No. 1.01). Based on the instructions given, the jury was properly instructed on the use of circumstantial evidence to prove the crimes, including the element of knowledge. The jury was instructed that it must find that defendant knew of the presence and nature of the controlled substance and that circumstantial evidence could be used to prove the same but to reject unreasonable interpretations of the evidence and to give defendant the benefit of reasonable doubt. Any defect in CALJIC No. 2.02 was cured by the other instructions given.

Even assuming error, it is not reasonably probable defendant would have obtained a more favorable result had the bracketed language ("mental state") in CALJIC No. 2.02 been given. (See *People v. Breverman, supra*, 19 Cal.4th at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Hernandez's testimony was not credible and easily rejected by the jury. He gave conflicting testimony about how often he used methamphetamine. He twice refused to identify his suppliers until he realized his entire testimony would be stricken. He then came up with a first name for one and both names for the other but no other information to locate the suppliers.

"If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

Although Hernandez had known defendant for years, he loaned his car only once, the time defendant was arrested. Hernandez initially claimed he remembered the methamphetamine and money were in the car but then claimed he had forgotten when he loaned the car to defendant. Although he would not leave his jewelry in his car, he left $260 and valuable drugs in his car. Hernandez's testimony was evasive and obviously a concocted story. Any error was harmless.

II

Defendant contends the trial court erred in denying his mistrial motion sought on the grounds of prosecutorial misconduct which occurred when the prosecutor violated an in-chambers ruling limiting her cross-examination of Hernandez. We conclude any prosecutorial misconduct was harmless.

Background

During an unreported chambers conference, the parties agreed that the prosecutor could ask Hernandez whether the consequences for defendant were greater than for Hernandez if convicted of possession for sale and transportation.

On cross-examination, the prosecutor asked Hernandez:

"Now, you know that the consequences for conviction for charges in this case, namely possession of methamphetamine for sale, are *much* greater for the defendant than they are for you, correct?" Hernandez answered affirmatively. (Emphasis added.) Defense counsel objected: "I would object to that question." The court overruled the objection. The prosecutor followed up:

"[The prosecutor]: Is that 'yes'?

“[Hernandez]: No. Excuse me? Repeat yourself again?

“Q. [] You know that the consequences for a conviction of being in possession of methamphetamine for the purposes of sale are *much* greater for the defendant than for you?

“A. I -- Doesn’t make a difference, does it?

“Q. You know that the consequences are greater for him than for you, correct?

“A. What do you mean by that? ‘Greater’?

“[The prosecutor]: May we approach?

“THE COURT: No. I don’t think there’s any need to.

“Q. [The prosecutor]: You don’t know what I mean by the consequences being greater for him than they are for you?

“A. You mean -- I don’t understand what you’re trying to say here.

“Q. Well, initially you said ‘yes’. What did you think that you were answering then?

“A. You mean he’s going to go to jail for it? Is that what you mean?

“Q. Well, you know the consequences --

“A. They’re both going to go to jail.

“Q. -- For you, correct?

“A. Yes.

“Q. But you’re telling the jury that that has no influence on your coming in here and claiming responsibility?

“A. I’m just taking the responsibility for it.

“Q. And you’re saying that for him, the person that you consider to be like a brother, for you, being greater than for you, has no bearing on your coming in here and testifying today?

“A. I don’t understand that.

“Q. Knowing that the consequences are greater if the defendant is convicted than if you are for this crime --

“A. Yes.

“Q. -- Knowing that, are you telling the jury that that has no influence on you at all to make you come in here and testify?

“A. No.

“Q. No, it doesn’t, or, no, you’re not telling the jury that?

“A. I guess I understand -- I’m telling the jury -- [¶] Are you saying that he’s going to get more time for it? For the drugs, you mean? [¶] I don’t understand what you are saying.

“Q. Well, I’m saying that the consequences for him are greater. If the two of you are convicted, the consequences are greater for him than for you?

“A. I understand that, yes.

“Q. And you’re telling me that that means nothing to you; that has no influence on you at all coming in here and testifying? That has not influenced you at all?

“A. No.

“Q. It’s simply that you want to come in here and take the responsibility for it?

“A. Yes.” (Emphasis added.)

Upon completion of Hernandez's testimony, the court excused the jury. Thereafter, defense counsel moved for a mistrial arguing that the prosecutor's question which was asked "three times" significantly differed from that agreed to in chambers. Defense counsel noted that defendant had more of a criminal history than Hernandez who had one arrest and no convictions. The prosecutor explained that she had to ask the question several times because Hernandez claimed he did not understand the meaning of consequences. Defense counsel complained that the prosecutor used the word "'penalty.'" The prosecutor retorted that Hernandez brought up the word jail and sentencing and claimed that she complied with the agreement to use the word consequences. Defense counsel stated the prosecutor stated the "consequences are much greater" which was "[i]n clear violation of what we had agreed upon." After clarifying that defense counsel was objecting to the prosecutor's use of the word "much," the court stated: "I'll give her that change -- The change of any of what we discussed. The witness didn't understand 'consequences', so she used the word 'penalties', the penalties are greater than they would be for him. [¶] He still didn't seem to understand it, so after repeating it three or four times, he seemed to understand what she was getting at. I don't see any error and improper conduct here. [¶] The bottom line was, it was a motive for him testifying; that's what we were trying to get at. And I think it was covered properly, so I am going to deny the motion for mistrial."

Standard of Review

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Referring to facts not in evidence is "'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at p. 828.)

"'The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.' [Citation.]" (*People v. Bell* (1989) 49 Cal.3d 502, 532.)

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at p. 820.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*Id.* at pp. 820-821.)

Prosecutorial misconduct is prejudicial when it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.] 'To constitute a due process violation, the prosecutorial misconduct must be of "'sufficient significance to result in the denial of a defendant's right to a fair trial.'" . . . When the defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important "as an initial matter to place th[e] remar[k] in context." [Citations.] . . .' [Citations.]" (*People v. Bell, supra,* 49 Cal.3d at p. 534.)

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1038.)

Analysis

Initially, we note that the in-chambers stipulation was not on the record. In discussing the mistrial motion, however, there seemed to be no disagreement that the prosecutor's question to Hernandez was to be limited to whether defendant would suffer greater, not *much* greater, consequences than Hernandez if convicted of possession of methamphetamine for sale and transportation of the same. Thus, in cross-examining Hernandez, the prosecutor appears to have violated the stipulation. Defense counsel's objection, however, did not specify the ground. He did not state that the prosecutor's question violated the stipulation. He simply stated that he objected to the question. Without a specified ground, the trial court properly overruled the objection notwithstanding that defendant moved for a mistrial on the specific ground after Hernandez had finished testifying and the jury was excused. Thus, any claim of prosecutorial misconduct was waived.

Further, the prosecutor's two questions where she added the word "much" before consequences, did not demonstrate an egregious pattern of misconduct to warrant a conclusion that the

trial had been infected with unfairness as to violate defendant's right to a fair trial or due process. The trial court stated it would give her that change.

In any event, any error was harmless. Defendant successfully bifurcated his priors. Defendant did not testify so the jury did not learn of his priors, evidence of which presumably would have been adduced on cross-examination. In questioning Hernandez about the consequences he would suffer as compared to defendant, the word "greater" itself, even without the word "much" before it, clearly conveyed to the jury that defendant would suffer more. From the fact that Hernandez had only one arrest and no convictions and that defendant would suffer much greater consequences, defendant claims the jury would infer that defendant had prior convictions. The prosecutor's question alone, to which defendant objected, would not necessarily convey that information to the jury. When read in context, perhaps the jury inferred that but that was due to defendant's witness who expressed a misunderstanding of the word consequences and blurted out, "You mean he's going to go to jail for it" and "Are you saying that he's going to get more time for it?"

Moreover, based on the overwhelming evidence of defendant's guilt and Hernandez's unbelievable testimony, defendant suffered no prejudice from the use of the prosecutor's use of the word "much."

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P.J.

CALLAHAN, J.